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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

RAYMOND J. HUGHES, JR.,

Petitioner,

v.

JOHN BUSS,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

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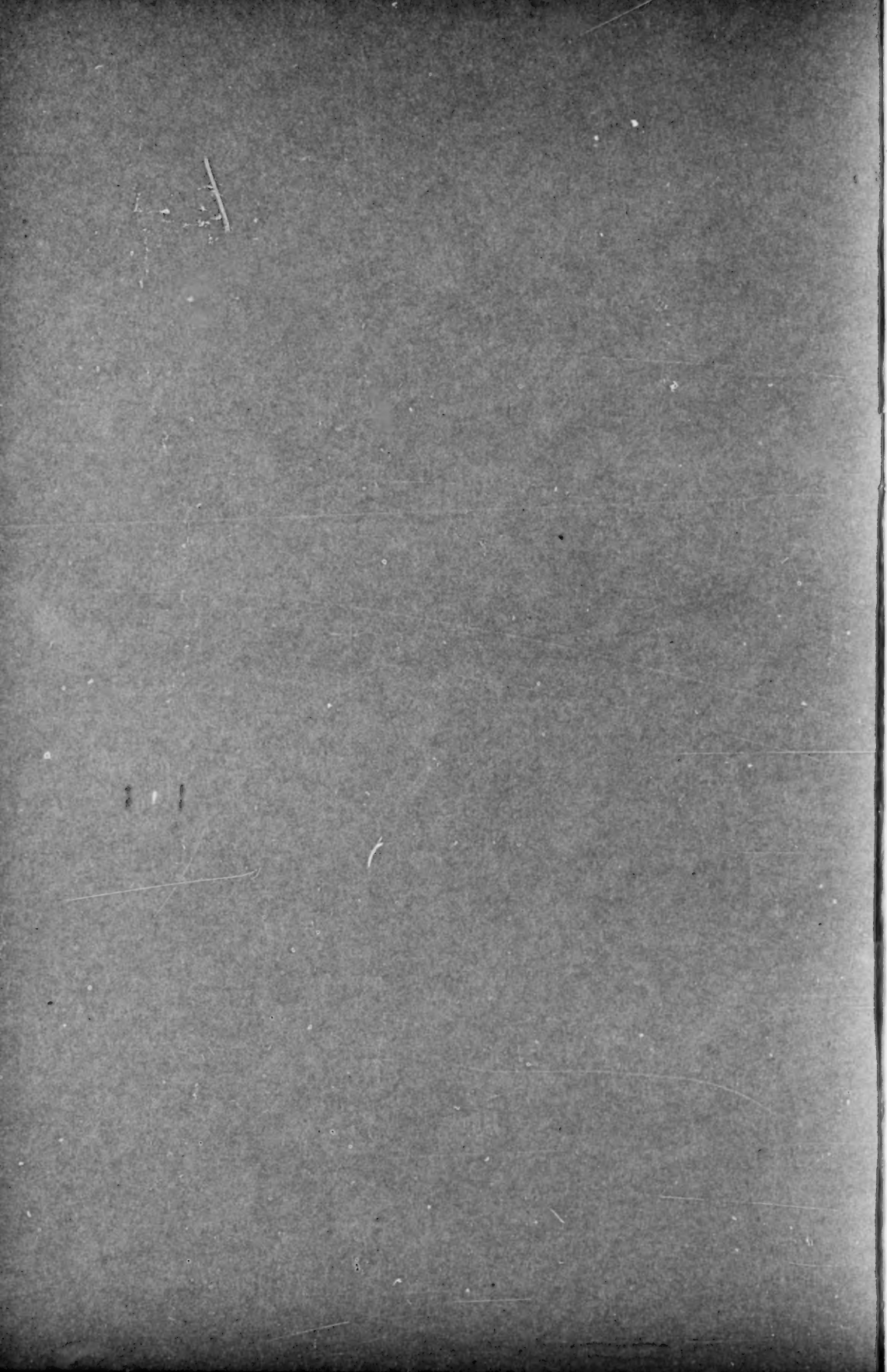


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OTHER AUTHORITIES

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QUESTION PRESENTED

1. Does the agreement of the parties as to a question of fact which is an element of subject-matter jurisdiction preclude the Court of Appeals from examining the basis for jurisdiction?

No. _____

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SUPPLEMENTAL STATEMENT OF THE CASE

The respondent submits that the opinion of the court of appeals and the memorandum decision of the district court each offer a fair, succinct statement of the material facts which are not in

dispute, petitioner's appendix, pages A-1 to A-4 and A-15 to A-21, respectively.

As noted by the petitioner, the parties to this action did agree in pleadings that respondent conservation warden John Buss was acting under color of state law at all times material to the lawsuit.

ARGUMENT

- I. THE DECISION OF THE COURT OF APPEALS IS PROPERLY BASED UPON THE PRINCIPLE THAT A COURT MAY AT ANY TIME EXAMINE THE BASIS FOR SUBJECT-MATTER JURISDICTION.

The parties agreed at the outset of this action that warden John Buss was acting both within the scope of his employment as a warden and under color of state law at all times material to this action. This is a civil rights action brought pursuant to 42 U.S.C. § 1983. Acting under color of state law is an

element of subject-matter jurisdiction in such an action, Polk County v. Dodson, 454 U.S. 312, 315, 70 L.Ed. 2d 509, 102 S. Ct. 445 (1981); Ford v. Harris County Medical Society, 535 F.2d 321, 323 (5th Cir. 1976), cert. den. 429 U.S. 780, 97 S. Ct. 492, 50 L.Ed.2d 589; Sinclair v. Spatocco, 452 F.2d 1213 (9th Cir. 1972) (per curiam), cert. den. 409 U.S. 886, 93 S. Ct. 102, 34 L.Ed.2d 142 (1972).

A court may at any point inquire into the basis for subject-matter jurisdiction, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 6-19, 72 S. Ct. 534, 541-43, 95 L.Ed. 702 (1950); Morris v. Gilmer, 129 U.S. 315, 325, 9 S. Ct. 289, 32 L.Ed. 690 (1889). The parties to litigation may not create by agreement subject-matter jurisdiction which does not otherwise exist, Mansfield, Coldwater & Lake Michigan R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 501, 511, 28 L.Ed. 462 (1884). The court

of appeals, on its own motion examined one factual element of subject-matter jurisdiction, acting under color of state law, and determined there to be no basis for this action. It is certainly true that the defense made no attempt to contest that issue before the district court but that choice did not and could not preclude the court of appeals from inquiring into the basis for subject-matter jurisdiction.

II. THIS PETITION PRESENTS AN
ISSUE WHICH IS ESSENTIALLY A
FACTUAL DISPUTE.

County sheriff's deputies received calls both from the respondent and from the petitioner asking that they come the scene of a confrontation. When they arrived respondent Buss described to them what had happened before their arrival. The county officers then independently concluded that there was a basis to arrest the petitioner (district court order, A-21). The

petitioner has claimed that the account which Buss gave to the county officers was so incomplete and inaccurate as to permit the inference that Buss intended thereby to bring about a unjustified arrest. The district court concluded that the account given by Buss was not materially inaccurate (order A-25). The court of appeals determined that Buss, in providing his description of the county officers, was not acting under color of state law (decision, A-10). If the petitioner is suggesting that every action done by every state employe must necessarily be under color of state law, that is not a correct statement of the law, Polk County v. Dodson, supra. If the petitioner is suggesting that in this specific situation that which the respondent did was under color of state law, that argument is entirely based upon the unique facts of this particular situation and for that reason is not an

appropriate matter for consideration upon certiorari.

CONCLUSION

The respondent respectfully submits that the circuit court acted properly in raising and resolving a factual issue which was an element of subject-matter jurisdiction for this action.

Respectfully submitted,

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